IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 12TH OCTOBER 2006 / 20TH ASWINA 1928

Crl.MC.No. 2423 of 2001()

CC.167/1999 of ADDL. CHIEF JUDICIAL MAGISTRATE COURT, TRIVANDRUM

PETITIONER: ACCUSED:

ANCY ALEXANDER KOTTATHOOR, PARAKOD,
ADOOR VILLAGE, (NOW RESIDING AT THOTTUMUKHATH HOUSE, NALANJIRA, THIRUVANANTHAPURAM).

BY ADV. SRI.V.PHILIP MATHEWS

RESPONDENTS: COMPLAINANT & REGISTRAR OF FIRMS:
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1. STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

2. REGISTRAR OF FIRMS, VANCHIYOOR, THIRUVANANTHAPURAM.

ADDL.R3 IMPLEADED:

3. G.BALAKRISHNA PILLAI, PRANAVAM, T.C.49/495, KONCHIRAVILA JUNCTION, MANACAUD P.O., THIRUVANANTHAPURAM.

ADDL.R3 IS IMPLEADED AS PER ORDER DATED 9.1.2002 ON CRL.M.P.NO.154 OF 2002.

R1 AND R2 BY PUBLIC PROSECUTOR SRI.JIKKU
R3 BY ADV. SRI.GOPAKUMAR R.THALIYAL

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 12/10/2006, ALONG WITH CRMC NO. 6684 OF 2000 AND CONNECTED CASES, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T. SANKARAN, J.

CRL.M.C. Nos. 2423 of 2001, 6684 of 2000, 3238, 4906, 4907, 4908, 4909,5418,5155,5158, 5159, 7901, 7902, 7903, 7904 7911 of 2001, 4832, 4833 OF 2003 & 49 of 2004

Dated this the 12th day of October,2006

O R D E R

All these Criminal Miscellaneous Cases are filed under Section 482 of the Code of Criminal Procedure seeking to quash the complaint against the respective petitioners. These Criminal Miscellaneous Cases arise out of seven cases, namely, C.C.Nos.65/1999, 167/1999, 156/1999, 215/1999, 155/1999, 1110/1999 and 1129 of 1999. The first five cases are pending before the Court of the Additional Chief Judicial Magistrate, Thiruvananthapuram while C.C.No.1110/1999 and 1129 of 1999 are pending before the Court of the Judicial Magistrate of the First Class, Thiruvalla. Crl.M.C.Nos.7911 of 2001, 7903 of 2001, 7901 of 2001, 7902 of 2001 and 7904 of 2001 are filed by

Santhamma Abraham, who is either the 10th accused or 11th accused in the first five cases mentioned above. Crl.M.C.Nos.4908 of 2001, 4909 of 2001, 4907 of 2001, 4906 of 2001 and 6684 of 2000 are filed by Renjith Abraham, who is accused No.11 in C.C.Nos.167/1999, 215/1999, 155/1999, 156/1999 and 65/1999. Swapna George, who is the 8th accused in C.C.Nos.215/1999, 65/1999, 156/1999, 167/1999 and 155/1999, has filed Crl.M.C.Nos.5159 of 2001, 3238 of 2001, 5418 of 2001, 5158 of 2001 and 5155 of 2001. Ancy Alexander, accused No.14 in C.C.No.167/1999, has filed Crl.M.C.No.2423 of 2001. Crl.M.C.Nos.4832 of 2003 and 4833 of 2003 are filed by accused Nos.4,5 and 6 in C.C.No.1110 of 1999 and C.C.No.1129 of 1999 while Crl.M.C.No.49 of 2004 is filed by accused No.6 in C.C.No.1110/1999.

2. The offences alleged against the accused persons in these cases are under Sections 406, 409, 120(B), 109 and 420 read with Section 34 of the

Indian Penal Code. The first accused in all these cases is a partnership firm, while the other accused are allegedly partners of the firm. The defacto complainants are persons who have deposited or entrusted amounts to the first accused partnership firm during various periods.

3. Except in the case in C.C.No.1110 of 1999, some of the accused in all other six cases aforesaid filed Crl.M.Cs. before this Court to quash the charge against them. All these cases were allowed by a learned single Judge as per order dated 2.4.2002 in Crl.M.C.No.2423 of 2001 and connected cases. The learned single Judge also relied on the decision of another learned single Judge in Crl.M.C.No.6684 of 2000, whereunder the proceedings in C.C.No.65 of 1999 as against the 11th accused was quashed. The common order dated 2.4.2002 in Crl.M.C.No.2423 of 2001 and connected cases was appealed against before the Honourable

Supreme Court by the defacto complainants who had already got themselves impleaded in the proceedings before this Court. The Honourable Supreme Court disposed of those appeals, namely, Crl.A.Nos.831-846 of 2004 by the order dated 6.8.2004, which reads as follows:

" **O R D E R**

Leave granted.

These appeals arise out of the two separate orders passed by the High Court of Kerala quashing the charge sheet/proceedings pertaining to different C.Cs. against some of the accused who filed petitions in the High Court under Section 482 Cr.P.C.

In the order out of which SLP (Crl.) No.3922 arises, charge sheet against the 11th accused was quashed by a one sentence order which is bereft of any reasons. In the order out of which SLP (Crl.) Nos. 5548-5562/2002 arises, the criminal proceedings against accused Nos.8, 11 and 14 were quashed. In this latter order, the earlier non-speaking order was relied upon by the High Court.

The charge sheet was filed by the police accusing the respondents of offences under Sections 406, 409, 120(B) and 420 read with Section 34 and 109 of the Indian Penal Code in connection with the collection of deposits which were not returned to the depositors. In the order passed by the High Court in

> Cr.M.C.Nos.2423/2001 etc. there is an extensive reference to the allegations in the charge sheet and the contentions and the principles laid down by this Court in regard to quashing of the proceedings. The order, however, does not spell out any reason worth mentioning in support of the conclusion reached therein. It was merely observed that the final report filed by the police did not prima facie disclose the commission of any offence.
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> We are of the view that such orders shall not be allowed to stand. We, therefore, set aside the orders of the High Court and remit the matters to the High Court for fresh consideration. It is pointed out by the learned counsel appearing for accused Nos.8, 11 and 14 that there are absolutely no grounds to proceed against them. All questions are left open to be considered by the High Court. The appeals are disposed of accordingly."

These Crl.M.Cs. have come up for hearing after the order passed by the Honourable Supreme Court.

4. Heard Sri.Vakkom Vijayan, Sri.V.Philip Mathews and Sri.Shaji P.Chaly appearing for the petitioners and Sri.Thaliyil Gopakumar, appearing for the defacto complainants.

5. The contentions on behalf of the petitioners

are the following: (1) The charge proceeds on the basis that the partnership was formed with an intention to defraud people. At the time when the partnership was formed, there was no transaction between the partnership as well as the petitioners and, therefore, the offences alleged against the petitioners would not stand. (2) Even if all the allegations in the charge as well as the materials relied on by the investigating officer are taken as true, it would not constitute an offence. (3) Even assuming that the allegations regarding payment of money and failure to repay are true, that would not attract the offences under Sections 406, 409 or 420 of the Indian Penal Code. (4) Swapna George, who is the 8th accused in the case was a minor at the time when the partnership was formed and she attained majority only on 15.3.1988. Ancy Alexander, accused No.14 in C.C.No.167/1999, was a minor at the time of formation of the partnership, her date of birth being 22.7.1978. Even if all the allegations are taken as true, Ancy Alexander and Swapna George being minors could not be proceeded

against and Section 83 of the Indian Penal Code would apply in their cases. (5) The minors who are admitted to the benefit of the partnership have retired on attaining majority and sufficient notice was given and the Registrar of Firms has accepted their retirement.

6. The allegation in the charge, inter alia, discloses the following facts: On 14.3.1985, a partnership firm was registered in the name and style "Malayil Bankers" of which accused Nos.2 to 14 are partners. They obtained licence from the Inspecting Assistant Commissioner on 20.4.1985 under the Kerala Money Lenders Act. The partnership started doing business at Thiruvananthapuram in the building belonging to witness No.126. Several branches were opened at different places and the business in finance was being carried on. In the same rooms in which Malayil Bankers was doing business at Thiruvananthapuram, two other firms, namely, "Malayil Bankers (HO)" and "Malayil Bankers and Investors" also started functioning. In 1993, the office of the firm

at Thiruvananthapuram was shifted to its own building and the second accused took charge as the Managing Partner. On 25.8.1993, another partnership firm under the name and style "Melwin Construction" was formed by accused 18 and 19 who are relatives of accused No.3 and started real estate business in the building belonging to Malayil Bankers and misappropriated the funds collected from the depositors. Accused Nos.2 to 19 entered into a criminal conspiracy and in pursuance of the same they made investors believe that interest at the rate of 20 – 24% would be given for the amounts deposited and the amounts could be withdrawn on two weeks' notice, that the amounts would be utilised for procuring gold on pledge and thus accused Nos.2, 3, 7, 5, 16 and 17 got deposits from various persons. On and from 23.8.1996, four other firms started functioning in the same building. These firms are, "Malayil Group Finance", "Malayil Financial Enterprises", "Malayil Finance Consolidated" and "Malayil Group Funds", of which the fourth one was an unregistered firm. Deposits from witness Nos.1 to 68

were received for the period from 3.8.1996 to 2.8.1997. A total sum of Rs.1,04,30,601/- was received as deposit. Receipts were given by accused Nos.2, 3, 15 and 17. Amounts deposited by the said persons were being deposited in several accounts and with an intention to cheat, false register numbers were entered in the receipts. The depositors were not being given interest regularly and even after they demanded return of the amount, it was not done. With the amount deposited by the investors, properties were acquired in the names of accused Nos.2 to 14 and a resort, namely, "Malayil Resort", was established. Accused No.7 was the Managing Director of "Malayil Resort". Huge amounts were diverted for the purpose of the Resort from out of the amounts received from investors. The statements made by 163 persons were recorded by the investigating agency, out of whom 68 are persons who had invested money. The above mentioned allegations are contained in the charge in C.C.No.167/1999. Similar allegations are made in the charges laid in the other cases as well except with slight changes either

regarding the period during which the amounts were collected or regarding quantum of the amount collected.

7. In the manner in which I propose to dispose of these Crl.M.Cs., I do not think it would be just, reasonable and feasible to deal with each and every contention raised by the accused persons and to arrive at a finding whether any offence is made out or not. Any such finding would either prejudice the prosecution or the accused.

8. The contention that even if all the allegations contained in the charge or in the First Information Statement are taken as true no offence is made out, is without any substance. On a reading of the charge as a whole, it is clear that offence would be made out if the allegations are taken as true.

9. The contention that Swapna George and Ancy Alexander were minors at the time when the partnership was formed and, therefore, they cannot be proceeded

with in the case as accused, prima facie, does not appear to be acceptable. Section 25 of the Partnership Act provides that every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner. Sections 63(1) and 72 deal with the notice to be given by a partner who retires from the firm. Section 30(5) provides that at any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm, and such notice shall determine his position as regards the firm. According to the counsel appearing for Ancy Alexander and Swapna George, they have decided not to become partners on their attaining majority. This statement is disputed by the learned counsel for the defacto complainants. Both sides have produced documents to substantiate their respective contentions. I do not find myself justified in considering those documents and in

arriving at a finding in one way or the other at this stage in a proceeding under Section 482 of the Code of Criminal Procedure. When there are conflicting versions as to the date of retirement of a partner and as to the exercise of the right by a minor partner under Section 30(5), the dispute can be resolved only after considering evidence including oral evidence. Such an exercise is outside the scope of Section 482 of the Code of Criminal Procedure. Moreover, under Section 30(6) of the Partnership Act, the burden of proving the fact that such person had no knowledge of such admission until a particular date after the expiry of six months of his attaining majority shall lie on such person. All these provisions would indicate that these questions cannot be decided at the pre-evidence stage. Therefore, the contentions raised by the petitioners are left open and they are free to raise the contentions at the appropriate stage after the evidence is adduced. A contention is raised by the petitioners that offences under Sections 406, 409 and 420 would not be made out even if it is taken that

amounts were accepted as deposits and the amounts were not repaid at the request of the depositors. Here also, to my mind, this is not the correct stage at which such contentions could be entertained. The dishonest intention is the relevant factor. The court would be able to ascertain whether there was dishonest intention or not only after considering the evidence, documentary as well as oral. In a proceeding under Section 482, the High Court cannot, on the basis of some of the documents produced by the petitioners or on the contentions raised by them, arrive at a finding as to whether there was dishonest intention so as to constitute an offence under Sections 406 and 420 of the Indian Penal Code.

10. For the aforesaid reasons, I do not think that this Court would be justified in exercising the jurisdiction under Section 482 and quash the complaint. All the Criminal Miscellaneous Cases are accordingly dismissed.

11. It is submitted that Ancy Alexander is now employed abroad and that it would not be possible for her to attend the Court on all posting dates. The learned counsel appearing for Swapna George submitted that she is staying with her husband in Kashmir and expressed the same difficulty in attending the Court on all posting dates. Taking into account these facts, it is only just and necessary to exempt their personal appearance before Court on all posting dates. The trial court shall exempt Swapna George and Ancy Alexander (accused Nos.8 and 14) from personal appearance except when the trial court is of the view that their presence is absolutely necessary.

It is submitted by the counsel appearing for the petitioners that suits were filed against the firm and a Receiver was appointed. The assets of the partnership firm are in the possession of the Receiver. They also submitted that some of the properties belonging to the partnership were sold by the Receiver and there are enough funds to discharge the liability

of the firm. The submission made by the petitioners is that they may be permitted to move the trial court at the appropriate stage in the light of any subsequent event in the civil litigations or otherwise. This submission is not opposed by the learned counsel for the defacto complainants. Leaving open such a liberty to the accused, these Criminal Miscellaneous Cases are dismissed. It is made clear that none of the observations made hereinabove would affect or prejudice the accused as well as the prosecution at the final trial and disposal of the cases, since no final and conclusive finding has been rendered hereinabove.

(K.T.SANKARAN)
Judge

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K.T.SANKARAN, J.

CRL.M.C. Nos. 2423 of 2001, 6684 of 2000, 3238, 4906,4907,4908,4909,5418,5155,5158, 5159, 7901, 7902, 7903, 7904 7911 of 2001, 4832, 4833 OF 2003 & 49 of 2004.

O R D E R

12th October, 2006